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IN THE

Supreme Court of the United States

October Term, 1967

No. 678

ISAAC SIMS, JR.,

Petitioner,

—v.—

STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

ISAAC SIMS, JR.,

Petitioner,

—v.—

STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above-entitled cause on June 22, 1967, rehearing of which was denied on July 6, 1967.

Opinion Below

The opinion of the Supreme Court of Georgia is reported at —— Ga. ——, 156 S. E. 2d 65. It is set forth in the appendix, *infra,* pp. 1a-5a.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered June 22, 1967 (IR. 285, *infra,* p. 6a)[1] and motion

[1] The certified record is in two parts: Part One (cited as IR. ——) consists of proceedings in this cause following the issuance

for rehearing was denied July 6, 1967 (IR. 291, *infra*, p. 7a). On September 15, 1967, Mr. Justice Black stayed enforcement of the sentence of death upon petitioner pending the timely filing and disposition of a petition for writ of certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Questions Presented[2]

1. Whether petitioner's Fourteenth Amendment rights were violated by the admission in evidence at his capital trial of a confession which he contends was coerced.

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of this Court's mandate in *Sims* v. *Georgia*, 385 U. S. 538 (1967); the first page of this part of the record is denominated Case No. 24152 in the Supreme Court of Georgia. Part Two (cited as IIR. ——) consists of earlier proceedings, including those reviewed by this Court in *Sims* v. *Georgia*, *supra*; the first page of this part of the record is denominated Case No. 22939 in the Supreme Court of Georgia. Both parts of the record are paginated independently with the page numbers at the lower left corner.

[2] This Court granted certiorari on questions 2, 4, and 6, in *Sims* v. *Georgia*, 384 U. S. 998, but decided the case upon another ground without reaching any of these questions, 385 U. S. at 539. It is well settled that this Court has certiorari jurisdiction over issues reserved in prior disposition of a cause. *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 553-55; *Hartford Life Ins. Co.* v. *Blincoe*, 255 U. S. 129; *Wolff Packing Co.* v. *Court of Indus. Relations*, 267 U. S. 552; *Aro Manufacturing Co.* v. *Convertible Top Co.*, 377 U. S. 476. See Rule 19(1)(a) of this Court, 388 U. S. 948. This Court is not bound by the Georgia Supreme Court's enunciation of the law of the case doctrine (IR. 282), in refusing to rule on matters previously adjudicated, because such a state law determination does not fetter the certiorari jurisdiction. See Mr. Justice Holmes' opinion in *Messinger* v. *Anderson*, 225 U. S. 436.

2. Whether petitioner's Fourteenth Amendment rights were violated by a conviction and sentence to death obtained on the basis of a confession made under inherently coercive circumstances within the doctrine of *Fikes* v. *Alabama,* 352 U. S. 191.

3. Whether petitioner's Fourteenth Amendment rights were violated by the use of a confession obtained from him shortly after an uncontested episode of severe physical brutality.

4. Whether petitioner's Fourteenth Amendment right to counsel as declared in *Escobedo* v. *Illinois,* 378 U. S. 478, was violated by the use of his confession obtained during police interrogation in the absence of counsel, or whether petitioner's right to counsel was effectively waived.

5. Whether petitioner has established an unrebutted prima facie case of racial exclusion from Georgia juries within the rule of *Whitus* v. *Georgia,* 385 U. S. 545, when:

(1) The process of jury selection from a racially designated source was identical to that condemned in *Whitus;* and

(2) The resulting exclusion of Negroes from jury lists was comparable to that shown in *Whitus.*

6. Whether petitioner's conviction is condemned by the Equal Protection Clause by reason of racial exclusion from the grand and traverse juries that indicted and convicted him, where:

(a) local practice pursuant to state statute required racially segregated tax books and county jurors were selected from such books;

(b) the number of Negroes chosen was only 5% of the jurors although Negroes comprise about 20% of the county taxpayers; and

(c) petitioner's offer to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years was disallowed.

Constitutional and Statutory Provisions Involved

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following Georgia statutes:

Ga. Code §38-411 (1933):

Confessions must be voluntary.—To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury.

Ga. Code Ann. §59-106 (1965 Rev. Vol.):

Revision of jury lists. Selection of grand and traverse jurors.—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose

names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Acts 1878-79, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44; 1953, Nov. Sess., pp. 284, 285; 1955, p. 247.)

Ga. Code §92-6307 (1933):

Entry on digest of names of colored persons.—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)[3]

Statement

Petitioner, Isaac Sims, an indigent, ignorant and illiterate Negro, is under a sentence of death by electrocution imposed by the Superior Court of Charlton County, Georgia, following his conviction for the crime of raping a white woman.

Petitioner had previously been indicted, convicted and sentenced to death at the October 1963 Term of the Superior Court for the same offense. That first conviction

[3] This section, applicable when petitioner was tried, was repealed in 1966, Ga. Code Ann. §92-6307 (1966 Supp.).

was set aside on habeas corpus by the Georgia Supreme Court, which ordered a new trial, on May 7, 1964. *Sims* v. *Balkcom*, 220 Ga. 7, 136 S. E. 2d 766 (1964). No appeal from the first conviction had been taken by Sims' court-appointed counsel, the court reporter had destroyed his trial notes, execution had been scheduled for November 13, 1963, and a commutation of sentence had been denied (II R. 87, 95, 336, 338). One of Sims' present counsel, Mr. Moore, then entered the case and initiated the habeas corpus proceedings resulting in the *Sims* v. *Balkcom* decision and obtained a stay on the day before Sims' scheduled execution.

The indictment leading to Sims' second conviction, returned October 6, 1964, charged that Sims raped Nola Jean Roberts on April 13, 1963, in Charlton County (IIR. 20-21). The trial commenced the next day, October 7, 1964, and a jury returned a verdict of guilty without recommendation of mercy on October 8, 1964 (IIR. 22). On appeal the Georgia Supreme Court affirmed the conviction, rejecting all of Sims' federal constitutional claims, *Sims* v. *State*, 221 Ga. 190, 144 S. E. 2d 103 (1965). This Court granted a writ of certiorari on five constitutional questions, 384 U. S. 998 (1966).

On January 23, 1967, the Court reversed and remanded the cause for proceedings conforming to *Jackson* v. *Denno*, 378 U. S. 368, without reaching any of the other issues raised, 385 U. S. 538. This Court's mandate duly issued (IR. 6-7) and the Georgia Supreme Court, *per curiam*, issued a remittitur on February 23, 1967, directing that (a) the Superior Court hold a hearing on the single question whether Sims' alleged confession was voluntary; (b) witnesses and other evidence might be introduced and con-

sidered; (c) if the Superior Court found the confession involuntary, a new trial should be ordered; (d) if the Superior Court found the confession voluntary, the conviction and sentence were to be affirmed, 223 Ga. 126, 153 S. E. 2d 567 (1967) (IR. 10-11).

On March 31, 1967, the Superior Court of Charlton County held a hearing at which no evidence was taken (IR. 250-268). The Superior Court, at the request of counsel for both parties, agreed to decide whether Sims' confession was voluntary *by reviewing the printed record used in this Court in Sims* v. *Georgia, supra,* No. 251, October Term, 1966 (IR. 261-263).[4] The Superior Court overruled Sims' various motions for a new trial on the basis of *Whitus* v. *Georgia,* 385 U. S. 545 (1967) (IR. 256-260, 263-265).[5]

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[4] At the March 31, 1967 hearing, in support of petitioner's position that the confession's voluntariness was to be determined on the basis of the printed record in *Sims* v. *Georgia,* 385 U. S. 538, petitioner stated that the Fourteenth Amendment required not a *de novo* hearing but only a judicial finding on voluntariness (IR. 251-252). Petitioner offered into evidence as Exhibit I, a certified copy of this Court's opinion in *Sims* v. *Georgia, supra,* which is reproduced at IR. 17-23. Petitioner also offered into evidence, as Exhibit 2, a certified copy of the transcript of record in this Court in *Sims* v. *Georgia, supra,* which is reproduced at IR. 24-211. Both exhibits were received in evidence (IR. 252). The hearing was before the same judge who presided at both of petitioner's trials and the solicitor general represented the state at both trials (IR. 252-253; IIR. 87, 338). One of Sims' present counsel, Mr. Moore, represented him at the second trial (IR. 253). Petitioner moved at the hearing that the court find the confession involuntary on the basis of the due process clause of the Fourteenth Amendment (IR. 265) and the court agreed to rule on that issue after studying the record (IR. 267). The court overruled petitioner's oral motion that a factual finding of the confession's involuntariness be entered as required by the Fourteenth Amendment and *Jackson* v. *Denno,* 378 U. S. 368 (IR. 253).

[5] At the March 31, 1967 hearing, petitioner moved for a new trial on the basis of *Whitus* v. *Georgia,* 385 U. S. 545, on the grounds that petitioner's grand and traverse juries were chosen

On April 19, 1967, the Superior Court rendered an opinion, holding upon the printed record in *Sims* v. *Georgia*, 385 U. S. 538, that Sims' confession was voluntary (IR. 227-234). On appeal,* the Georgia Supreme Court affirmed, rejecting petitioner's federal constitutional claims on the grounds (1) that the doctrine of law of the case prevented litigation of matters previously adjudicated and (2) there was no error in finding the confession voluntary (IR. 282-284). Rehearing was denied July 6, 1967 (IR. 291).

A. Facts Regarding Petitioner's Confession

Since the Superior Court of Charlton County, in assessing whether petitioner's confession was voluntary, wholly relied upon the printed certified record before this Court in *Sims* v. *Georgia*, 385 U. S. 538 (IR. 261-263) and since this Court in *Sims thoroughly reviewed the applicable facts*,

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in a manner held unconstitutional in *Whitus* (IR. 256). In support of this motion, petitioner offered in evidence the affidavit of Mr. Harper, one of petitioner's counsel, regarding the number of Negroes on the grand and traverse jury box lists from which petitioner's grand and traverse juries were selected (IR. 257). The Superior Court, considering this motion to be outside the mandates issued in this cause, overruled the motion (IR. 260). The affidavit was not admitted in evidence (IR. 268) but it was made a part of the record and is reproduced at IR. 212-226. Petitioner also moved the Court to rule on the demand for a new trial, on the authority of *Whitus*, when it ruled on the confession's voluntariness (IR. 263-264). The Superior Court similarly considered this motion outside the mandates and overruled it (IR. 265).

*Subsequent to filing a notice of appeal (IR. 3), petitioner filed two motions in the Superior Court: (a) Motion for Rulings on Oral Motions Made at Hearing, seeking in essence to obtain an explicit federal constitutional ruling on the voluntariness of petitioner's confession (IR. 241-242); (b) Renewed Motion for New Trial on the Authority of *Whitus* v. *Georgia*, 385 U. S. 545 (1967) (IR. 236-238). In an order dated May 9, 1967, the Superior Court ruled it was without authority to entertain either motion and, therefore, made no ruling on either (IR. 245).

petitioner here sets out the relevant portions of this Court's opinion, 385 U. S. at 539-541, 543:

> The record indicates that on April 13, 1963, a 29-year-old white woman was driving home alone in her automobile when petitioner drove up behind her in his car, forced her off the road into a ditch, took the woman from her car into nearby woods and forcibly raped her. When he returned to his car, he could not start the engine so he left the scene on foot. Some four hours later he was apprehended by some Negro workers who had been alerted to be on the watch for him. He told these Negroes that he had attacked a white woman. They then turned petitioner over to their employer who delivered him to two state patrolmen. He was then taken to the office of a Doctor Jackson who had previously examined the victim. Petitioner's clothing was removed in order to test it for blood stains. Petitioner testified that while he was in Doctor Jackson's office he was knocked down, kicked over the right eye and pulled around the floor by his private parts. He was taken to a hospital owned by Doctor Jackson, which was adjacent to his office, where four stitches were taken in his forehead. Thereafter the patrolmen took petitioner to Waycross, Georgia, some 30 miles distant, where he was placed in the county jail. During that evening, he saw a deputy sheriff whom he had known for some 13 years and who was on duty on the same floor of the jail where petitioner was incarcerated. He agreed to make a statement and was taken to an interview room where, in the presence of the sheriff, the deputy sheriff and two police officers, he signed a written confession. Two days later he was arraigned.

Prior to trial petitioner filed a motion to suppress the confession as being the result of coercion. A hearing was held before the court out of the presence of the jury. The sheriff and the deputy testified to the circumstances surrounding the taking and signing of the confession. Petitioner testified as to the abuse he had received while in Doctor Jackson's office. He testified that he "felt pretty rough for about two or three weeks [after the incident], more on my private than I did on my face" and that he "was paining a right smart." There was no contradictory testimony taken. The court denied the motion to suppress without opinion or findings and the confession was admitted into evidence at petitioner's trial.

At the trial, Doctor Jackson was a witness for the State. On cross-examination he denied that he had knocked petitioner down while the latter was in his office, or that he had kicked him in the forehead but made no mention of the other abuse about which petitioner testified. The doctor stated that petitioner was not abused in his presence but he refused to say whether the patrolmen present abused petitioner as he was not in the office at all times while the petitioner was there with the patrolmen. In this state of the record petitioner's testimony in this regard was left uncontradicted.

* * * * *

Petitioner testified that Doctor Jackson physically abused him while he was in his office and that he was suffering from that abuse when he made the statement, thereby rendering such confession involuntary and the result of coercion. The doctor admitted that he saw petitioner on the floor of his office; that he helped him

disrobe and that he knew that petitioner required hospital treatment because of the laceration over his eye but he denied that petitioner was actually abused in his presence. He was unable to state, however, that the state patrolmen did not commit the alleged offense against petitioner's person because he was not in the room during the entire time in which the petitioner and the patrolmen were there. In fact, the doctor was quite evasive in his testimony and none of the officers present during the incident were produced as witnesses. Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers and was in conflict with the testimony of the physician.

(A more detailed statement of the facts of record relevant to petitioner's confession contentions is set out at pp. 24-35 *infra*.)

B. Racial Discrimination in the Selection of Petitioner's Grand and Traverse Juries

In *Whitus* v. *Georgia*, 385 U. S. 545, 548, this Court described the general Georgia procedure for selecting juries:

> Georgia law requires that the six commissioners appointed by the Superior Court "select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets." Ga. Code Ann. §59-106. They are also directed to select from this group a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, writing their names on other tickets. The entire group, excepting

those selected as grand jurors, constitutes the body of traverse jurors. The tickets on which the names of the traverse jurors are placed are deposited in jury boxes and entered on the minutes of the Superior Court. Ga. Code Ann. §§59-108, 59-109. The veniremen are drawn from the jury boxes each term of court and it is from them that the juries are selected.

Ga. Code §92-6307, at the time of trial in this cause, provided that "Names of colored and white taxpayers shall be made out separately on the tax digest." Under local practice in Charlton County, where petitioner was tried and convicted, separate sections of the tax digest were maintained for white and Negro names, the whites listed on white paper, the Negroes on yellow paper (PR. 82; IR. 68).[7] The jury commissioners, all of whom are white (PR. 83), rely upon their personal knowledge of the persons listed in the tax digest and their personal opinions of those persons' character and intelligence, in selecting "upright and intelligent citizens to serve as jurors." Ga. Code Ann. §59-106. In practice, they first examine white taxpayers' names, then Negroes' names. Despite a commissioner's testimony that no consideration is given to race, the separate lists make it clear whether any particular taxpayer is white or Negro (PR. 80-81, 84, 91-92).

The 1960 United States Census for Charlton County shows 2,656 persons over twenty-one, of whom 728 or 27.4% are non-white (PR. 75). Petitioner offered to prove a pattern of jury discrimination for the ten years preceding

[7] Citations to PR. ——, refer to the printed certified record in *Sims* v. *Georgia*, 385 U. S. 538, admitted in evidence (IR. 252) and reproduced at IR. 24-211. Owing to the accessibility of the printed record, citations refer, where possible, only to it.

trial but this offer of proof was disallowed because of a recent jury list revision (PR. 5, 8, 12, 70, 93, 95). The 1963 Tax Digest shows 1,959 taxpayers, of whom 410, or 20.4% are Negroes (PR. 74). The record does not reveal how many of these 1,959 taxpayers were *individuals*. The 1964 tax digest lists 1,553 individual taxpayers, of whom 380 or 24.4% are Negro individual taxpayers (Harper Affidavit, IR. 213).[8] Of the 147 names on the September 3, 1964, grand jury list, from which petitioner's grand jury was selected, approximately 7 or 4.7% were Negroes (Harper Affidavit, IR. 213). Of the 479 names on the September 3, 1964 traverse jury list, from which petitioner's traverse jury was selected, approximately 47 or 9.8% were Negroes (Harper Affidavit, IR. 212-213). Of the panel of 99 jurors chosen for the October, 1964 Term of the Charlton Superior Court, from which the grand and traverse jurors were selected in Sims' case, approximately 9 or 9% were Negroes (Harper Affidavit, IR. 213-214). At the trial only 5 of the 99 names were identified as Negroes (PR. 74, 89-90, 297-298).

A comparison of the September 3, 1964 grand and traverse jury lists with the Colored Tax Payer section of the 1964 tax digest revealed that the names of Negroes where they appeared on those lists, were virtually without exception consecutively listed out of alphabetical order (Harper Affidavit, IR. 214).

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[8] The Harper affidavit was excluded from evidence but made a part of the record, see n. 5, *supra*.

Reasons for Granting the Writ

I.

Petitioner's Constitutional Rights Were Violated by the Use at His Trial of Confessions Which (A) Were Judged by Standards of Voluntariness That Were Not in Accord With Constitutional Requirements; (B) Were Obtained in Inherently Coercive Circumstances Following the Uncontested Physical Brutalization of Petitioner While in Police Custody; and (C) Were Obtained in Violation of Petitioner's Sixth Amendment Right to the Assistance of Counsel.

Introduction

The evidence upon which Sims was convicted consisted principally of testimony by the prosecutrix that Sims "forced her car off the road, dragged her into the woods, pulled her clothes off, and raped her" (PR. 334), and that he "kept choking her and threatened to kill her if she screamed" (*ibid.*). In addition, there was testimony by the mother of the prosecutrix and her physician, Dr. Jackson, as to her condition after the attack, and evidence of admissions and confessions by the defendant.[9] The circumstances

[9] At petitioner's trial the State introduced testimony concerning an alleged oral confession by petitioner Isaac Sims to Deputy Sheriff Jones (PR. 210), and a written confession signed by Sims purporting to give the details of the crime (PR. 226-27). Both the alleged oral confession (which Sims denied making) and the signed statement were obtained April 13, 1963, while petitioner was in custody in the Ware County Jail, as the sole suspect in a capital felony. The prosecution also introduced testimony of a state investigator that on the afternoon of April 15, 1963, he read the written confession of Sims who said it was true (PR. 238). Sims stated at trial that he did not understand what he was doing when he signed the confession and that he was innocent of the crime (PR. 141, 248).

of these admissions and confessions, which Sims contends were involuntary and obtained by coercion, are set forth in detail *infra*. The text of a written confession signed by Sims while in custody appears at PR. 226-227. This confession was written by a deputy sheriff and read to Sims, who is unable to read or write. The first three sentences and last three paragraphs of the statement were admittedly not statements made by Sims but, rather, assertions of the voluntariness of the confession written by the deputy and read to Sims (PR. 100-101, 103-104, 218-219).

Petitioner denied understanding the import of the statement and denied his guilt in sworn testimony at a voir dire hearing and in an unsworn statement before the jury (PR. 134-135, 248). Sims, in his mid-twenties at the time of arrest, was a pulpwood worker who quit school at age seventeen or eighteen, having completed only the third grade (PR. 128-130). His understanding is severely limited as is illustrated by the following testimony, which is a mere sample of his incapacity as revealed in the record:

> Mr. Moore: Do you know what is meant by "the statement can be used against you in court"?
>
> Mr. Sims: Statement can be used against me?
>
> Mr. Moore: Statement can be used against you in court. Do you know what that means?
>
> Mr. Sims: No, sir.
>
> Mr. Moore: Do you know what it means to be informed of your legal rights?
>
> Mr. Sims: Well, that's like being good or something?
>
> Mr. Moore: Is that what it means to you, Isaac?
>
> Mr. Sims: Yes, sir (PR. 136).

* * * * *

Mr. Moore: Isaac, do you know what "Constitutional rights" means?

Mr. Sims: Do you mean good or something?

Mr. Moore: Is that what it means to you, Isaac?

Mr. Sims: Yes, sir (PR. 137).

A. *The Standards Applied Below to Determine Voluntariness Were Insufficient to Satisfy Constitutional Requirements.*

1. The Superior Court's Opinion, April 19, 1967.

Following the remand in *Sims* v. *Georgia*, 385 U. S. 538, the Superior Court ostensibly complied with this Court's mandate by making an independent factual inquiry into the voluntariness of petitioner's confession, and duly entering findings of fact and conclusions of law. Examination of those findings and conclusions, however, compellingly demonstrates that Isaac Sims has still not been given the hearing on his claims of coercion required by the Constitution and by this Court. The Superior Court has so persistently made findings unsupported by the record, ignored material evidence, and declined to resolve material evidentiary disputes, that no inference is possible but that the Superior Court resolved the issue of coercion by reference to standards inconsistent with the law of the Fourteenth Amendment. We believe (as we shall show in the succeeding subparts of this Petition) that application of proper Fourteenth Amendment standards invalidates petitioner Sims' confession as a matter of law. However this may be—whether or not a finding of voluntariness might be made on this record consistently with proper Fourteenth Amendment standards—the failure of the Courts below to apply such standards is alone a sufficient reason for a second grant of *certiorari* and reversal of Sims' conviction.

The Superior Court's opinion is divided into three principal sections: uncontroverted facts, controverted facts, and findings of fact. No section fairly reflects the record, focuses on relevant issues, or addresses or resolves the factual controversies which the Fourteenth Amendment makes determinative. For example, in the section reciting purportedly uncontroverted facts, the Superior Court states that there were no threats of violence against Sims while he was in the Ware County Jail or the interview room. The Court makes no mention of Sims' testimony he was scared, that he was suffering by reason of earlier uncontested brutality, and that the Ware County officers "scolded" him a little while he was in the interview room. (*Compare* IR. 230 *with* PR. 139, 143.) Similarly the Superior Court states Sims was not denied the use of a telephone. It makes no mention of the fact that Sims was not offered the use of a telephone. (*Compare* IR. 230 *with* PR. 222.) The Superior Court states that Deputy Sheriff Dudley Jones wrote Sims' statement as it was made by Sims. Yet the record uncontradictedly shows that those portions of the statement referring to its voluntary character with Sims having been warned of his legal rights were inserted by the officers, not spoken by Sims. (*Compare* IR. 230 *with* PR. 228-229.)

In the section of its opinion concerning purportedly controverted facts, the Superior Court erroneously asserts that Dr. Jackson denied dragging Sims on the floor by his private parts. (*Compare* IR. 232 *with* PR. 204-207.) As this Court noted, Dr. Jackson did not deny or mention this abuse in his testimony, *Sims* v. *Georgia*, 385 U. S. at 541. The Superior Court also erroneously asserts that Sims nowhere claimed that anyone other than Dr. Jackson struck

him (IR. 232). The record clearly shows that Sims stated "they," referring to white state patrolmen in Dr. Jackson's office, kicked and possibly beat him (PR. 248). This Court accurately concluded, on the same record, that, "Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers and was in conflict with the testimony of the physician." *Sims* v. *Georgia,* 385 U. S. at 543.

The most striking feature of the Superior Court's "Findings of Fact" is their failure to resolve evidentiary conflicts which the Superior Court itself identified (albeit in some matters erroneously, as we have just noted). No findings at all are made concerning the critical events in Dr. Jackson's office, and no findings are made which would suggest the irrelevancy of those events—no findings, for example, that the effects of the brutality practiced on Sims in Jackson's office were attenuated by passage of time. Unless it be assumed that the Superior Court failed palpably to do the job of fact-finding which *Jackson* v. *Denno* and this Court's mandate in *Sims* commanded, one can only conclude that the Superior Court thought these factual matters irrelevant. No clearer display of inattention to proper federal standards for determining the admissibility of a confession can be conceived.

The Superior Court, in its findings of fact, does conclude that Sims "knowingly waived" his right to have an attorney; that Sims "knew that any statements he made could be used against him in court"; and "[t]hat based upon observation of the defendant's demeanor while testifying under oath, his reactions and responses to questions propounded upon direct and cross-examination, it is the opinion of the Court that he has the mental capacity to understand the instructions of the officers and the nature and

effect of the statement he made and signed" (IR. 234). These findings are made in the teeth of the record. Sims' stunted mental capacity rendered him unable—even in the safety of the courtroom—to explain words or phrases such as "normal and ordinary" (PR. 144), "legal rights" (PR. 136), "constitutional rights" (PR. 137), "freely and voluntarily" (PR. 136), "the right to have a lawyer" (PR. 137), or that "a statement can be used against you in court" (PR. 136). Allowing all due deference to the mystique of demeanor which the Superior Court invokes, it is simply fanciful to find that Sims could "knowingly" waive his right or "knew" any statement made by him could be used against him in court. The Superior Court, it should be noted, nowhere intimates that Sims was an untrustworthy witness or was feigning the extremity of mental dullness evident in his testimony. It is uncontested, of course, that Sims is an illiterate, and that he quit school in the third grade when he was seventeen or eighteen.

The Superior Court also found as facts that "there was no violence or threats of bodily harm, and no duress or coercion practiced upon the defendant" (IR. 234). This finding is wholly without foundation in the record for, as has been said *supra*, Sims' statements are uncontradicted as to Dr. Jackson's dragging him on the floor by his private parts and as to violence which the state patrolmen practiced on him (PR. 131, 204-207, 248).

Finally, the Superior Court found "that at the time the confession was made the defendant was in possession of mental freedom to confess or deny his participation in the crime, and that he voluntarily, knowingly and freely made the confession in the interview room of the Ware County Jail, in Waycross, Georgia on April 13, 1963, at 10:30

P.M." (IR. 234). This finding is a penetrable conclusion, based on nothing stronger than the partial, incomplete and unsupported findings that precede it. We think that, in its totality, the court's opinion speaks for itself and establishes beyond peradventure a failure to apply proper constitutional standards in passing on the admissibility of Sims' written confession.

2. The Georgia Supreme Court Opinions of July 14, 1965, and June 22, 1967.

The Georgia Supreme Court in its July 14, 1965 opinion, 221 Ga. 190, 144 S. E. 2d 103, seems to have taken the same narrow view as the Superior Court with regard to the applicable test for voluntariness. Its opinion gives little evidence of an examination of the totality of the circumstances surrounding the confession. There is, for example, no mention of the physical brutality to which Sims was subjected while in custody during the investigation process. Nor is there any discussion of the many other factors such as Sims' mental condition, injuries, education, isolation, etc., which are federally pertinent. Rather, the court apparently found it sufficient to resolve the issue that there was testimony that petitioner was advised of certain rights; that the Sheriff testified "that no threats or promise of hope or benefit or reward were made to induce Sims to make a statement" (PR. 335); and that there was thus, a "prima facie showing that the statement was freely and voluntarily made and admissible in evidence. Code §38-411" (PR. 336).

Following this Court's reversal of the decision of July 14, 1965 and the Superior Court's rendition of its opinion of April 19, 1967, the Georgia Supreme Court reconsidered the case on June 22, 1967 (IR. 285), handing down the judgment whose review is now sought. In the June 22, 1967

opinion the Georgia Supreme Court reviewed in greater detail the circumstances which took place in Dr. Jackson's office but quoted *in extenso* from its former opinion as to the manner in which the written confession was obtained. The Georgia Supreme Court relied dispositively on the inadequate findings of the Superior Court, holding: "The trial judge, as the trier of fact, who presided at the trial when the various witnesses testified, had the opportunity of judging the credibility of such witnesses and it cannot be said the decision of the trial court finding that the confession was voluntarily made was error for any reason assigned" (IR. 284).

There is no intimation here of a shift from the Georgia Supreme Court's earlier, artifically restrictive and federally erroneous view of "voluntariness," and no correction of the insufficient consideration given the federal issue by the Superior Court. It is therefore clear, we submit, that petitioner has never had a decision of the issue of voluntariness made with reference to the appropriate constitutional standards at any level—neither by the trial judge, or the state appellate court. To give effective life to its earlier mandate and to assert the meaningfulness of the inquiry which that mandate required, the Court should again review this case and should reverse petitioner's conviction on the authority of *Rogers* v. *Richmond*, 365 U. S. 534.

In *Rogers, supra*, the Court invalidated a conviction resting on a confession which the trial judge and the State's highest court had approved, since it appeared they both "failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession" (365 U. S. at 540). The error of the Connecticut courts was in determining admissibility

"by reference to a legal standard which took into account the circumstance of probable truth or falsity" (365 U. S. at 543).

In Isaac Sims' case, it is apparent that the courts below made a similar error. Ignoring facts and circumstances plainly pertinent under federal standards, and narrowly concentrating on the immediate scene of the confession, to the exclusion of vital earlier events that affected Sims' will to make it, the Superior and Supreme Courts appraised the case in terms of only the most obvious and obtrusive, immediately contemporaneous, external coercive influences. They restricted their attention to the sorts of blatant duress made relevant by the Georgia statutory standard for the admissibility of confessions—threats and promises—and thus ignored a multitude of the more subtle factors which this Court has recognized as pertinent to the inquiry whether a confession is in fact, as the Fourteenth Amendment requires, a free and uncompelled act: the accused's mental feebleness, *Culombe* v. *Connecticut*, 367 U. S. 568; lack of education, *Fikes* v. *Alabama*, 352 U. S. 191; fears bred of race, *Payne* v. *Arkansas*, 356 U. S. 560; the stripping of the accused, *Malinski* v. *New York*, 324 U. S. 401; physical brutality, *Brown* v. *Mississippi*, 297 U. S. 278; failure to warn the accused of his rights to silence and to appointed counsel, *Davis* v. *North Carolina*, 384 U. S. 737.

Furthermore this Court long ago condemned as unduly restrictive a review of confessions that was limited to determining whether they were induced by immediate duress, in such forms as promises or threats. Mr. Justice Brandeis wrote in *Wan* v. *United States*, 266 U. S. 1, 14-15:

> The court of appeals appears to have held the prisoner's statements admissible on the ground that a confession made by one competent to act is to be deemed voluntary, as a matter of law, if it was not induced by a promise or a threat; and that here there was evidence sufficient to justify a finding of fact that these statements were not so induced. In the Federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. Bram v. United States, 168 U. S. 532.

At least since *Chambers* v. *Florida*, 309 U. S. 227, 239, the rule of *Wan* has been the law of the Fourteenth Amendment. See also *Ward* v. *Texas*, 316 U. S. 547, 555; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154. Petitioner has thus not had a determination of voluntariness in the courts below which is consistent with constitutional standards. *Rogers* v. *Richmond*, 365 U. S. 534; *Wan* v. *United States*, 266 U. S. 1; cf. *Haynes* v. *Washington*, 373 U. S. 503, 516-517, note 11. The Court should granted certiorari so to declare.

B. *Petitioner's Confession Was Obtained in Inherently Coercive Circumstances and After He Had Been Physically Brutalized While in Custody, and Its Use to Convict Him Violates the Due Process Clause of the Fourteenth Amendment.*

1. Facts and Circumstances Surrounding the Confession.

Isaac Sims was taken into custody by Sgt. George Sims and Trooper Peacock of the State Patrol at about 3:00 p.m. on April 13, 1963 (PR. 184-185). On orders from Sheriff Sikes, petitioner was taken by Sgt. Sims to the medical office of Dr. Joseph M. Jackson (PR. 185). He was taken directly to Dr. Jackson's office from the place where the police took him in custody (PR. 184-185). It is clear that the officers took Sims to Dr. Jackson's office as a part of their investigative process, so that his clothes might be removed and examined for evidence of the crime (PR. 205, 206-207).

Petitioner Sims testified very clearly that he was brutalized while in custody at Dr. Jackson's office. He gave such testimony both in the pre-trial hearing outside the presence of the jury (PR. 131), and in his unsworn statement, before the jury (PR. 248). Sims stated that he was in Dr. Jackson's office with seven or eight white state patrolmen. When asked what happened to him there, Sims said (PR. 131):

> Well, Dr. Jackson, he knocked me down and kicked me over my eye lid and busted my eye on the right side.
>
> Q. Did anything else happen to you? A. And he grabbed me by my private and drug me on the floor.

Sims' statement before the jury was to the same effect (PR. 248):

Well, they brought me over to Dr. Jackson's office and they carried me in there, about six or seven State Patrols, and Dr. Jackson beat me, and taken my clothes off, and then carried me over to the bigger hospital and stitched my eye up where they kicked me over the eye, and put me on some white clothes—white pants, but I kept my shirt I had on.

Q. While you were in Dr. Jackson's office did he drag you around the floor? A. Yes, sir.

* * * * *

Q. (By the Defendant's Attorney) What happened to you while you were in Dr. Jackson's office? A. Well, he pulled me by the privates.

When Sims testified in the pre-trial hearing he was cross-examined, but *the prosecutor never asked Sims a single question about what happened to him in Dr. Jackson's office* (PR. 137-143). In addition, *the prosecutor put on no testimony at all to rebut Sims' claim* that he was beaten, kicked over the eye, and pulled by his private parts in the presence of six to eight officers.

The prosecutor never asked any witness a single question about what happened in Dr. Jackson's office. Sgt. George Sims, the officer who took petitioner to and from Dr. Jackson's office (PR. 185), was never asked what happened in the office.[10] The other officers who were present were never called to testify or identified by name.[11] The prosecutor did not ask Dr. Jackson a single question (on

[10] Dr. Jackson said that he presumed that the officers in the office with Sims were the ones who brought him there (PR. 202).

[11] The exception was Trooper Peacock who was mentioned by Sgt. Sims (PR. 184) but did not testify.

direct or re-direct) about what happened while Sims was in his office (PR. 189-197, 208).

Defense counsel did cross-examine Dr. Jackson about the events in his office (PR. 202-207). Certain aspects of Sims' testimony were confirmed by Dr. Jackson, who said:

(a) that Sims was brought to his office (PR. 202);

(b) that police officers and troopers were there and he was not alone with the defendant (PR. 202);

(c) that Sims' clothes were removed (PR. 202);

(d) that he (Dr. Jackson) "assisted him slightly" and gave him "a little help" in removing his clothes, including his pants and his underpants (PR. 202-203, 206-207);

(e) that Sims was down on the floor while in the office (PR. 203, 204);

(f) that by the time Sims left the office he "had a place over his eye that required some treatment" (PR. 204);[12]

(g) that when Sims left "he was taken over to the hospital and the place was treated that I told you about" (PR. 207);

(h) that at the hospital Dr. Aztui put four stitches in the injury over Sims' eye (PR. 207).

Dr. Jackson's explanation of what happened to petitioner in his office was highly evasive and partly in the form of denials of knowledge about what happened to Sims. Asked whether the State Patrolman "put the place

[12] A state investigator observed the injury on his face two days later (PR. 242).

over his eye," Jackson answered, "I don't know who put it there" (PR. 204). When asked if the officers were beating Sims he said:

> A. You'll have to ask the officers.
>
> Q. I'm asking you, Dr. Jackson. I'm asking you whether or not the officers were beating the defendant.
>
> A. I will say that I wasn't there all the time (PR. 204).

Referring to the "place" over Sims' eye, Jackson was asked:

> Q. He didn't have it over his eye when he came into your office, did he? A. I didn't see him till after he got in.
>
> Q. And when you first saw him in your office he didn't have it? A. I couldn't see it. He was sort of slumped over, sort of falling around, like. Most anything could have happened to him (PR. 204).

Dr. Jackson denied that he knocked Sims down (PR. 204) or that he kicked him (PR. 205). But when asked whether Sims was kicked he said only: "I don't know that he was" (PR. 205). Earlier, Dr. Jackson was asked whether Sims was knocked down and he said: "I don't know whether he was knocked down or fell down" (PR. 203).

Dr. Jackson was asked:

> Q. Did you find him down on the floor? A. He sort of fell in the floor.
>
> Q. He just sort of fell? Where were you standing at the time he sort of fell? A. I was standing on my feet.
>
> Q. Were you standing near him? A. Fairly close.

Q. Were you standing as close as I am to you, or closer? A. Probably a little closer.

Q. Where you could touch him? A. I think he could touch me.

Q. And you could touch him? Right? A. Yes (PR. 204).

Thus, Dr. Jackson's testimony was that Sims was close enough to touch him when he fell on the floor, but Dr. Jackson did not know "whether he was knocked down or fell down" (PR. 203). Later Jackson said Sims was on the floor when he entered the room (PR. 205). In Jackson's own words, "Most anything could have happened to him" (PR. 204). Despite all this, throughout the entire trial the prosecutor avoided any inquiry into what happened to Sims in Dr. Jackson's office. Although Dr. Jackson denied on cross that he knocked Sims down or kicked him, the prosecution asked no questions about this and called none of the policemen to corroborate the doctor's denial. Plainly Sims was injured while in custody. There was no suggestion that he resisted arrest or anything of that nature.

Moreover, *the doctor gave no testimony denying Sims' claim that he was pulled by his private parts and dragged on the floor.* There was no rebuttal or denial of this testimony at all and it stands uncontradicted and uncontested in the record. The language of the Court in *Haynes* v. *Washington,* 373 U. S. 503, is pertinent in appraising the State's failure to rebut Sims' claim of brutality:

> We cannot but attribute significance to the failure of the State, after listening to the petitioner's direct and explicit testimony, to attempt to contradict that crucial evidence; this testimonial void is the more

meaningful in light of the availability and willing cooperation of the policemen who, if honestly able to do so, could have readily denied the defendant's claims. (373 U. S. at 510.)

In addition to the evidence of physical brutality, there are, of course, a variety of other facts to be considered in appraising the totality of circumstances surrounding the confessions. They reveal that Sims was bewildered, helpless, alone, hungry, in pain and in fear when he signed his written statement.

Isaac Sims is an indigent, ignorant, illiterate Negro, who cannot read and can write only his name (PR. 130). He has spent most of his life in Charlton County in the southeast part of Georgia (PR. 129). Both of his parents are dead; his closest relatives in Charlton County were two sisters (PR. 128). At the time of his arrest he was in his twenties; the record leaves his exact age unclear.[13] Sims was unable to tell what year he was born (PR. 128). He went to the third grade in school, quitting when he was "seventeen or eighteen" (PR. 130). He testified, "Well, I didn't go [to school] too much on account of I had to help my father work, and he taken me out of school" (PR. 129). He worked as a pulpwood worker, earning forty to sixty dollars a week. He is indigent, had appointed counsel at his first trial, and has proceeded in forma pauperis throughout the case.

The record reveals his limited mental capacity in many instances. He did not know the year he was born; nor could

[13] The confession stated that he was 27 on the day of arrest in April 1963 (PR. 226); he testified that he was 29 at the trial in October 1964 (PR. 247), but his birthdate was February 5 (PR. 128).

he state when his father died (PR. 128). He was totally unable to explain words and phrases such as "normal and ordinary" (PR. 144), "legal rights" (PR. 136), "constitutional rights" (PR. 137), "freely and voluntarily" (PR. 136), "the right to have a lawyer" (PR. 137), or that "a statement can be used against you in court" (PR. 136). Sims "stutters" when he speaks (PR. 122).

Sims was a Negro charged with the rape of a white woman—a capital felony in Georgia. The prosecutrix was the unmarried daughter of the local postmaster (PR. 61). At about 2:00 or 2:30 p.m. Sims was taken into custody and held at gunpoint some five miles from the scene of the crime by two Negro men who had been ordered by their boss, a local white man, to look for any "stray man" (PR. 169, 175-176). He was then taken by this white man, Noah Stokes, accompanied by several other men, to state troopers who carried him to Dr. Jackson's office where Sims was brutalized as we have described above. After Sims was treated at the hospital for his eye injury, the police took him to the Ware County Jail in Waycross, some thirty or thirty-five miles away from Folkston and located outside the county where the crime occurred, for "safe keeping" (PR. 233-234, 242).

The police testimony is that at about 6:30 p.m., while confined in a cell at the Ware County Jail, Sims orally admitted "raping" or "molesting" a white woman in Folkston in a conversation with Deputy Sheriff Dudley Jones whom Sims had known for more than a dozen years previously[14] (PR. 113, 209-210, 214-216). Jones did not testify that he gave Sims any warnings prior to eliciting this admission, either

[14] Sims denied making this oral confession (PR. 134, 138-139).

as to Sims' right to remain silent, that his statement would be used against him, or as to his right to counsel. Jones testified that Sims then agreed when asked if he wanted to make a statement to the sheriff (PR. 113, 210).[15]

Sims remained alone in a cell until about 10:00 or 10:30 that evening when he was taken to the "interview room" in the jail (PR. 210, 223). Sims had not been fed since he was taken into custody some 8 hours earlier and he was still in pain from the injury sustained in Dr. Jackson's office.[16] There were four white officers in the "interview room" with Sims: they were the Sheriff and Deputy Sheriff of Ware County, the Chief of Police, and the Constable.[17] Sims testified that he was "scared" (PR. 143). As to his treatment, he said, "they didn't beat me, but they kind of scolded me a little" (PR. 139). None of Sims' testimony in these regards was rebutted.

Since his arrest, petitioner had not been in touch with any relative, friend or attorney. He had not been offered the use of a phone (PR. 222) and he had not been taken before a magistrate in accordance with Georgia law (PR. 235-

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[15] Sims also denied this (PR. 133).

[16] Sims testified at PR 135-136:

> A. Well, I felt pretty rough for about two or three weeks, more on my private than I did on my face.
>
> Q. When you said you felt pretty rough, what did you mean, Isaac? A. Well, I was paining a right smart.
>
> Q. Were you paining a right smart when you were in the room with Sheriff Lee and Deputy Sheriff Jones? A. Yes, sir.
>
> Q. Now, after you were taken into custody up until the time you were taken upstairs had you been given anything to eat? A. No, sir.
>
> Q. Were you hungry? A. Yes, sir; I could have eat.

[17] The Police Chief and Constable were not called as witnesses.

236).[18] He was in jail in the adjoining county some 30 or 35 miles from Folkston (PR. 67, 242).

The record does not make it clear how long Sims was in the interview room before the confession was given and signed,[19] or to what extent, if any, Sims was interrogated.

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[18] Georgia law specifically required bringing petitioner promptly before a magistrate where, as here, the arrest was made without a warrant:

> *"Duty of person arresting without warrant.*—In every case of an arrest without a warrant the person arresting shall without delay convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose and any person who is not conveyed before such officer within 48 hours shall be released." Ga. Code §27-212 (1933).

Even if the arresting officers had a warrant, they were similarly obligated:

> *"Officer may make arrest in any county. Duty to carry prisoner to county in which offense committed.*—An arresting officer may arrest any person charged with crime, under a warrant issued by a judicial officer, in any county, without regard to the residence of said arresting officer; and it is his duty to carry the accused, with the warrant under which he was arrested, to the county in which the offense is alleged to have been committed, for examination before any judicial officer of that county.
>
> "The county where the alleged offense is committed shall pay the expenses of the arresting officer in carrying the prisoner to that county; and the officer may hold or imprison the defendant long enough to enable him to get ready to carry the prisoner off. (Acts 1865-6, pp. 38, 39; 1895, p. 34.)" Ga. Code §27-209 (1933).

[19] Sheriff Lee testified (PR. 104):

> Q. Do you know what time on the evening of April 13, 1963, that you started taking this statement? A. Well, the statement was short. It wouldn't have taken but just a few minutes.
> Q. How many minutes? A. Oh, ten or fifteen minutes.
> Q. Did you start taking the statement at 10:30 or did you

When asked whether he questioned Sims, Sheriff Lee said, "I don't think so," then, "I could have," and finally, "I just don't recall right now" (PR. 105). Sims said he was questioned by Lee (PR. 135, 140), and also that he was "scolded" (PR. 139).

Deputy Sheriff Jones wrote out the confession and read it to Sims. He admittedly wrote out some matter which Sims did not say. The Sheriff, and his deputy who actually wrote the confession, testified petitioner did not say that the statement had been made freely and voluntarily or that he had been informed of his legal rights, although the written statement includes those words. In fact, petitioner does not even know the meaning of "freely and voluntarily" (PR. 136). Every word in the confession asserting its voluntariness and its having been made with knowledge of the legal consequences was inserted not by petitioner but by his inquisitors. The deputy sheriff crossed out several words in the original statement, including the words, "I have read" when it was learned the petitioner could not read (PR. 229).

The sheriff testified that he told petitioner that before he made a statement he was entitled to an attorney and

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conclude it at 10:30? A. Well, I wouldn't say we finished at 10:30 or started at 10:30. It was approximately 10.

Q. So you questioned him from 10 to 10:30? A. How is that?

Q. You questioned him from 10 to 10:30? A. I didn't say that.

Q. You started at 10? A. I didn't say that.

Q. You started at 10:30, then? A. I said that we could have finished at 10:30 or started at 10:30. I don't recall.

Deputy Sheriff Jones said that Sims was brought down at 10:30 (PR. 113); that it took him approximately twenty to thirty minutes to write down Sims' statement (PR. 119), and five or six minutes to read it to him (PR. 121-122).

that petitioner said he did not want one (PR. 99-100, 224). The sheriff also said that he told petitioner "that the statement he was going to give could be used against him in court" (PR. 99-100, 225). On each of the occasions at trial when Sheriff Lee recounted his warning to Sims, he failed to mention that he advised Sims of his right to remain silent (PR. 99-100, 224-225). However, a sentence at the end of the confession written by the deputy recites: "I have been informed of my legal rights by Sheriff Robert E. Lee that I did not have to make any statement whatsoever, knowing that this statement can be used against me in a court of law" (PR. 227). No one offered Sims the use of a phone or advised him that a lawyer would be appointed if he could not afford one.

On Monday afternoon, April 15, 1963, Agent F. F. Cornelius of the Georgia Bureau of Investigation brought Sims in handcuffs from the jail in Waycross back to the sheriff's office in Folkston (PR. 237, 241). Cornelius questioned Sims in the sheriff's office in the presence of five other police officers[20] (PR. 239-240). Cornelius read the statement Sims had signed on Saturday night to Sims, asked him if it was true, and Sims said, "Yes, sir" (PR. 238). Cornelius did not caution Sims that he was not required to answer and could remain silent, or otherwise advise him of his rights (PR. 241). Sims apparently still had no attorney and had not seen any friends or relatives during the period since his arrest (PR. 241-242). He was first taken before a magistrate on April 15th (PR. 66). The record is silent on whether the questioning by Cornelius came before or after that proceeding. But a warrant charging Sims with the

[20] None of these five officers testified at the trial.

crime had been issued at some time before he was brought back to Folkston and made the admissions to Cornelius (PR. 239).

2. The Confessions Were Obtained in Inherently Coercive Circumstances; Their Use Violated the Due Process Clause; and the Decision to the Contrary by the Courts Below Warrants Review Here by Reason of Its Inconsistency With Pertinent Decisions of This Court.

The Court has consistently held that the voluntariness of a confession must be determined in the context of all the surrounding circumstances as they appear from the Court's independent examination of the uncontested facts on the entire record. Examination of the record in this case makes it plain that each of the confessions allegedly given by Sims to the law authorities while he was in custody were given in inherently coercive circumstances and were not voluntary.

The recitation of the facts above demonstrates that *Fikes* v. *Alabama*, 352 U. S. 191, should have compelled the Georgia courts to exclude Sims' confessions. The similarities between this case and *Fikes* are numerous and significant. In both cases the petitioner was a Negro in his mid-twenties charged with a sexual assault upon the daughter of a local public official in a southern community. Both Fikes and Sims had attained only third grade educations when they quit school in their late teens. Sims, like Fikes, is of limited mentality. In this case, as in *Fikes*, the petitioner was first arrested by civilians; was not arraigned or taken before a magistrate prior to his confession; was carried to a jail far from the scene of the crime; and was allegedly advised of some of his legal rights by a law

enforcement officer before confessing. Sims saw no friend, relative or counsel; Fikes saw his employer, but his father and a lawyer were denied access to him. The *Fikes* record contained "no evidence of physical brutality" (352 U. S. at 197). But Isaac Sims made a strong and largely uncontested showing that he was brutalized and suffered injury requiring medical treatment, while in the custody of officers who were engaged in an investigative process.

The *Fikes* case involved a longer period of custody and questioning before the confession, viz., five days in *Fikes* as against 7 or 8 hours in this case. But even a short period of time may be sufficient to overpower a suspect's will (*Haley* v. *Ohio,* 332 U. S. 596), and the denial of food to petitioner during his confinement bears directly upon the confession's alleged voluntariness (*Watts* v. *Indiana,* 338 U. S. 49, 53; *Payne* v. *Arkansas,* 356 U. S. 560, 567), as does the stripping of petitioner in Dr. Jackson's office (*Malinski* v. *New York,* 324 U. S. 401). The physical beating suffered by Sims is sufficient to counterbalance the comparatively short period of questioning revealed by the record. As Mr. Justice Frankfurter (joined by Mr. Justice Brennan) said concurring in *Fikes* v. *Alabama,* 352 U. S. 191, 198:

> It is, I assume, common ground that if this record had disclosed an admission by the police of one truncheon blow on the head of petitioner a confession following such a blow would be inadmissible because of the Due Process Clause.

Sims has more than met the requirement that he show "one blow." It is not disputed that while engaged in their investigation the police took Sims to Dr. Jackson's office where he sustained injuries requiring medical treatment

(four stitches over the eye), which he claimed were received from blows and kicks in the presence of the police, an episode the prosecution has never troubled to deny or rebut. We submit that it is plain that the prosecutor never asked a question or put on a witness to deny Sims' version of this incident because he could not honestly do so (cf. *Haynes* v. *Washington*, 373 U. S. 503, 510).

The element of violence in this case makes it as strong, if not stronger than *Fikes, supra,* and similar cases where the Court has viewed the circumstances as sufficiently coercive to strike down convictions. See, particularly, *Haynes* v. *Washington,* 373 U. S. 503; *Culombe* v. *Connecticut,* 367 U. S. 568; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Johnson* v. *Pennsylvania,* 340 U. S. 881 (*per curiam;* facts stated in *Culombe* v. *Connecticut,* 367 U. S. 568, 628).

And, of course, the fact that Sims' signed statement contains assertions of voluntariness, composed by the police, does not suffice to save the confession in view of the other circumstances. A strikingly similar recital also dictated by the police was disregarded by the Court in striking down the conviction in *Haley* v. *Ohio,* 332 U. S. 596, 598, 601. Sims' testimony indicates he did not even comprehend the meaning of the recitals of voluntariness or understand the significance of the warnings he was given. His supposed waiver of the right to counsel could not, given his lack of understanding and inability to understand common legal terms expressed in ordinary language, be regarded as "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst,* 304 U. S. 458, 464. Plainly, petitioner did not know a lawyer's function or understand how a lawyer could be of assistance to him.

Here, as in *Fikes,* "The totality of the circumstances that preceded the confessions . . . goes beyond the allowable limits" (352 U. S. at 197). The conclusion applies equally to the alleged oral admission to Deputy Jones, the signed statement, and the testimony that the signed statement was reaffirmed two days later. For, as in *Clewis* v. *Texas,* 386 U. S. 707, 710, "There is here no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statement from the effect of all that went before." Indeed, Sims' case is even more compelling than *Clewis,* where the Court did not consider the contentions of physical mistreatment, 386 U. S. at 709. It is uncontradicted that Sims was brutalized in Dr. Jackson's office, 385 U. S. at 540-541, 543. The length of time between Clewis' earlier coerced confessions and the later confession there in issue was nine days, 386 U. S. at 709-710, but this Court found that length of time insufficient to vitiate the effect of the earlier coerced confessions on the later one. In Sims' case, the length of time between the violence in Dr. Jackson's office and the written confession was approximately five hours. As in *Clewis,* "no lawyer was present, nor had petitioner been advised of his right to have one appointed" at the time of the written statement, 386 U. S. at 710. Moreover, the record here uncontradictedly shows that Sims was "physically weakened and in intense pain" from having been dragged on the floor by his private parts, *Reck* v. *Pate,* 367 U. S. 433, 442, and there is no evidence that Sims received any medical attention for this pain which affected him for two or three weeks after the date of his capture (PR. 135-136).

3. The Physical Violence Inflicted on *Sims* Is Sufficient by Itself to Invalidate the Confessions; and This Court Should Grant Certiorari to Declare That No Confession Obtained Shortly After Physical Brutality Is Practiced Upon an Accused May Be Admitted Against Him Consistently With the Fourteenth Amendment.

We submit that the physical violence inflicted on Sims while in custody, during a police effort to find evidence of the crime by examination of his clothes, is alone sufficient to vitiate the confessions obtained thereafter. It is conceded that he was stripped of his pants and underpants in a room full of men. No witness has denied his story that he was pulled by his private parts and dragged across the floor. His version was not even challenged by cross-examination. It is conceded that he sustained injuries requiring medical treatment while in a room containing a doctor and policemen. No one told any story about how Sims received his injuries except Sims. Dr. Jackson's evasions are plain on the record and have been noted by this Court; he offered no explanation of Sims' injury.

In *Payton* v. *United States*, 222 F. 2d 794, 796-97 (D. C. Cir. 1955), a confession was obtained while an accused had blood on his shirt, having been recently bleeding as the result of force reasonably used by the officers to effect his arrest and confinement. The Court excluded a confession and reversed a conviction on the ground that admission of a confession following so shortly after violence upon the prisoner—albeit reasonably necessary violence—was improper. Judge Fahy wrote for the Court (at 797):

> We assume the officers had authority to use the force reasonably necessary to effect the arrest and confinement. But when a confession is elicited so soon after

> the use of violence upon the prisoner, resulting in bloodshed, the compelling inference is that the confession is not the free act of the prisoner. It is immaterial that other coercion did not occur at the very moments he was questioned and signed the statement. Violence at the hands of the Police admittedly had occurred within about an hour. A confession made in such circumstances, and thereafter repudiated by the accused, should not be admitted in a criminal trial in a Federal court. "The undisputed facts showed that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass." Ziang Sung Wan v. United States, 266 U. S. 1, 16-17; . . . [other citations omitted].

Judge Fahy quotes (222 F. 2d at 797, note 5), from the opinion in *Stein* v. *New York*, 346 U. S. 156, 182, as follows:

> "Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim."

The *Stein* opinion further states in language that is relevant here:

> *Slight evidence, even interested testimony, that it* [defendant's injury] *occurred during the period of detention* or at the hands of the police, *or failure by the prosecution to meet the charge* with all reasonably

> available evidence, might well have tipped the scales of decision below. Even here, it would have force if there were any evidence whatever to connect the admitted injuries with the events or period of interrogation. But there is no such word in the record. (346 U. S. at 183, emphasis added.)

As we have seen, there is ample evidence to show that Sims' injury occurred during detention and the prosecution has made no effort to meet the charge with any evidence. Nor can it matter that the same officers who later obtained Sims' confessions were not shown to have been present when he was mistreated. There was no showing that the coercive impact of his mistreatment during the investigative process (in the presence of seven or eight officers by Sims' account) was at all eliminated by his being transported thirty or more miles to another county and turned over to other officials. Sims testified as to his continuing pain for a prolonged period far beyond the last of the confessions. The oral admission to Deputy Jones was said to have occurred at about 6:30, less than three hours after Sims was injured. The written statement followed a few hours later after a period of isolated confinement. The final admission of the accuracy of the signed statement to state investigator Cornelius must obviously fall if the statement itself is excluded. It is clearly tied to the written statement. In any event, it occurred after petitioner had been returned to Folkston, the scene of his original beating and again in a room with six policemen.

If the confession involved here had been introduced at a trial held after June 13, 1966, the conviction would plainly be summarily reversed on the authority of *Miranda* v. *Arizona*, 384 U. S. 436; *Johnson* v. *New Jersey*, 384 U. S.

719; cf. *Davis* v. *North Carolina*, 384 U. S. 737, 739. The courts below did not have the benefit of the specific guidelines set forth in *Miranda*, and concededly the full panoply of protection given by that decision is not available to Sims. But in an important sense *Miranda*—apart from its specific guidelines—represents a distillation of the lessons learned through the long experience of this Court in the review of in-custody confession cases. It plainly reflects sensitive awareness of a problem the Court has recognized before, namely, that:

> What actually happens to them [prisoners] behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused, he is faced with the task of overcoming, by his lone testimony, solemn official denials. (*Culombe* v. *Connecticut*, 367 U. S. 568, 573-574, opinion of Justice Frankfurter, joined by Justice Stewart.)

We urge that in light of this consideration, the Court now grant *certiorari* to declare unequivocally that any in-custody confession which follows close upon the spilling of the prisoner's blood while he is alone in the hands of officers (*Payton* v. *United States, supra*)—a confession following a blow (*Fikes, supra*, Justice Frankfurter, concurring) or unexplained evidence of injury to a prisoner during detention (*Stein, supra*)—must be excluded without further inquiry whether the prisoner's will was overborne by the brutality.

We recognize that this rule has not been uniformly followed in the past and that confessions have been sustained

notwithstanding physical violence as in *Lisenba* v. *California*, 314 U. S. 219. But we urge such a general principle as consistent with the spirit and learning of *Miranda* v. *Arizona*, 384 U. S. 436. *Lisenba* dates from an era when this Court's concern in state criminal cases was with the performance of the state courts, not the police. Long before *Miranda*, that concern had broadened. See *Blackburn* v. *Alabama*, 361 U. S. 199; *Spano* v. *New York*, 360 U. S. 315. There can be no justification for police brutality upon a prisoner, and no legitimate police interest in beatings. There will be explanations offered, of course (although not even those were offered here), and speculation that the prisoner was hard-headed and remained unaffected. *Miranda* counsels that no ear be given to these unlitigable matters. Where blood has flowed, no confession made soon after should be tolerated consistent with due process of law.

C. *The Decision Below Violates Petitioner's Sixth Amendment Right to Counsel in Conflict With Escobedo v. Illinois, 378 U. S. 478, and Other Decisions of This Court.*

Petitioner's trial commenced some four months after the decision in *Escobedo* v. *Illinois*, 378 U. S. 478; thus that decision may be applied in judging his case. *Johnson* v. *New Jersey*, 384 U. S. 719. The *Escobedo* decision focused on the right to counsel under the Sixth Amendment in appraising in-custody confessions. This Sixth Amendment emphasis is in contrast to the reliance upon protection of the Fifth Amendment privilege against self incrimination in *Miranda* v. *Arizona*, 384 U. S. 436.

Most of the elements present in *Escobedo* were present in this case. When Sims' confessions occurred "the investi-

gation [was] . . . no longer a general inquiry into an unsolved crime but ha[d] begun to focus on a particular suspect, the suspect ha[d] been taken into police custody, the police carr[ied] out a process of interrogations that lends itself to eliciting incriminating statements, . . . and the police ha[d] not effectively warned him of his absolute constitutional right to remain silent . . . " (378 U. S. at 490-491).

However, it could not be said on this record that Sims had "requested and been denied an opportunity to consult with his lawyer." Sims never requested a lawyer for he was incapable of understanding how a lawyer might help him, had no funds to hire a lawyer, was given no opportunity to consult with friends or family, or even to use a telephone, and was not informed of his right as an indigent to appointed counsel.

We submit that in these circumstances the general principle enunciated in *Escobedo* and in cases decided earlier require the conclusion that Sims was denied the assistance of counsel in violation of the Sixth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Even before *Escobedo,* it had been recognized that the right to counsel might be violated by in-custody interrogation in the absence of counsel. The Ninth Circuit so held in *Griffith* v. *Rhay,* 282 F. 2d 711 (9th Cir. 1960), cert. den. 364 U. S. 941. The Court of Appeals there adopted the reasoning of *Crooker* v. *California,* 357 U. S. 433, 438-440, that—apart from questions of voluntariness—interrogation in the absence of counsel might deny due process if an accused "is so prejudiced thereby as to infect his subsequent trial with an absence" of fundamental fairness. On all the circumstances of the case, in-

cluding education and mentality of the accused, the Court of Appeals found Griffith's interrogation without counsel fundamentally unfair and his confession inadmissible despite a failure to request counsel. See also the opinion of Judge Browning in *Brubaker* v. *Dickson,* 310 F. 2d 30 (9th Cir. 1962), cert. den. 372 U. S. 978, generally in accord with *Griffith* v. *Rhay, supra.* We ask that this Court consider whether a similar ruling is not required on this record.

An additional point may be made with respect to Sims' confession to state investigator Cornelius on Monday, April 15. This took place after a warrant against Sims had been issued by a judicial officer. The warrant is not in the record and it cannot be determined on this record whether it was issued upon the basis of the prior confession (though this seems likely) or some other showing against Sims. In any event, at this stage Sims was, though not yet indicted, plainly in the position of an "accused" being held in anticipation of trial. See Ga. Code §27-209, quoted *supra* note 18. He still had no lawyer, but following his confession and the issuance of a warrant against him he was plainly accused and, for every relevant purpose, in a position exactly comparable to a man under indictment. He surely was in need of a lawyer to prepare for the inevitable trial and to advise him.

The premise of *Spano* v. *New York,* 360 U. S. 315, 324-327 (concurring opinions) and *Massiah* v. *United States,* 377 U. S. 201, is that indictment marks the point in the criminal process when investigation is completed and trial preparation begins. At this point, "'when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Massiah* v.

United States, 377 U. S. 201, 205.[21] Obviously, in the proceedings in petitioner's case the period following issuance of the warrant rather than that following indictment was the stage envisaged by this language. It should be noted that petitioner was formally indicted no earlier than a few days before trial on each of the two occasions on which he was tried.[22]

We submit that the principles of *Spano* and *Massiah* require that this confession be excluded under the Sixth Amendment. To be sure, unlike *Spano* and *Massiah*, Sims had not yet been formally indicted at the time of the admission to Cornelius. But he was more than a suspect at this point. In every realistic sense he was "the accused" (Ga. Code §27-209) and was "scheduled to be tried" once the police had obtained his signed confession and a warrant against him. The subsequent interrogation by Cornelius was more than an interrogation focusing on a suspect. Cornelius sought a final nail in the coffin which was already almost closed by the signed confession. This final confession closed the case, and after it effective aid and advice by counsel "at the only stage when legal aid and advice would help" (*Spano, supra*, 360 U. S. at 326) became impossible. The refusal of the courts below to apply *Escobedo* in these circumstances, independently of other issues, warrants this Court's review.

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[21] Quoting from *Powell* v. *Alabama*, 287 U. S. 45, 57.

[22] The exact dates of the first indictment and of commencement of the first trial are not in this record. But Sims was indicted at the October 1963 term and the date of sentencing October 9, 1963, appears (PR. 251, 256). The second indictment was filed October 6, 1964 (PR. 1); trial commenced October 7, 1964 (PR. 46, 198, 249) and the verdict was returned October 8, 1964 (PR. 2).

II.

Certiorari Should Be Granted to Resolve the Conflict of the Judgment Below With This Court's Decision in *Whitus* v. *Georgia*, 385 U. S. 545; and to Determine That the Refusal of the Courts Below to Permit Evidence of the Systematic Exclusion of Negroes From Jury Service Denied Petitioner the Equal Protection of the Laws.

A. *Whitus v. Georgia Governs This Case.*

Petitioner Sims' claims of discrimination in the selection of Charlton County grand and traverse juries are identical to those vindicated by this Court in *Whitus* v. *Georgia*, 385 U. S. 545. See also *Bostick* v. *South Carolina*, 386 U. S. 479, *reversing* 247 S. C. 22, 145 S. E. 2d 439 (1965). *Whitus* was decided by this Court the same day as *Sims* v. *Georgia*, 385 U. S. 538; but in reversing *Sims* solely on the basis of *Jackson* v. *Denno*, the Court did not decide *Sims'* jury discrimination claim, 385 U. S. at 539. The Superior Court of Charlton County, Georgia, and the Georgia Supreme Court thereafter refused to consider the effect of *Whitus* on this case (IR. 245, 256-260, 263-265, 282).

The process of juror selection in *Whitus* is so similar in design and operation to the process here, and the resulting exclusion of Negroes so nearly alike, that the *Whitus* holding will be whittled away to an intolerably narrow factual base if the decision below is permitted to stand. Certiorari should be granted to reaffirm *Whitus* and to confirm its applicability to the facts of the present record.

In *Whitus*, 385 U. S. at 548, this Court described the general Georgia procedure for selecting juries—the procedure used in this case (PR. 76-80, 84, 86-87):

> Georgia law requires that the six commissioners appointed by the Superior Court "select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets." Ga. Code Ann. § 59-106. They are also directed to select from this group a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, writing their names on other tickets. The entire group, excepting those selected as grand jurors, constitutes the body of traverse jurors. The tickets on which the names of the traverse jurors are placed are deposited in jury boxes and entered on the minutes of the Superior Court. Ga. Code Ann. §§ 59-108, 59-109. The veniremen are drawn from the jury boxes each term of court and it is from them that the juries are selected.

Ga. Code §92-6307, effective at the time of petitioner Sims' trial,[23] as at Whitus', provided that "Names of colored and white taxpayers shall be made out separately on the tax digest." Under local practice of Charlton County, where petitioner was tried and convicted, separate sections of the tax digest were maintained for white and Negro names, the whites listed on white paper, the Negroes on yellow paper

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[23] Although the statute requiring racial designations on the tax records has since been repealed in Georgia, the persistence of similar requirements in other states makes the issue as worthy of consideration now as it was at the time of *Whitus* and *Sims* (I). See e.g., Ark. Stat. Ann. §§3-118, 3-227, 39-208, sustained in *Maxwell* v. *Stevens*, 348 F. 2d 325 (8th Cir. 1965), and again sustained following *Whitus* in *Maxwell* v. *Bishop*, 257 F. Supp. 710 (E. D. Ark. 1966), *denial of application for certificate of probable cause rev'd*, 385 U. S. 650 (1967).

(PR. 82). The jury commissioners, all of whom are white (PR. 83), rely upon their personal knowledge of the persons listed in the tax digest and their personal opinions of those persons' character and intelligence, in selecting "upright and intelligent citizens to serve as jurors." Ga. Code Ann. §59-106. In practice, they first examine white taxpayers' names, then Negroes' names. Despite a commissioner's testimony that no consideration is given to race, the separate lists make it clear whether any particular taxpayer is white or Negro (PR. 80-81, 84, 91-92).[23]

This procedure is identical in all material regards to the procedure invalidated in *Whitus* (and in *Bostick, supra*), presenting in its key feature—the selection of jurors, in the discretion of jury commissioners, from tax records maintained with statutorily required racial designations—an identically fatal potential for racial exclusion or limitation. At the time they select persons from the tax digest, white jury commissioners are palpably confronted with the racial identity of each taxpayer. This statutory reminder is the more efficacious because the provision governing jury selection, Ga. Code Ann. §59-106, gives no specific guidance to the commissioners in their choice of jurors. Rather, the statute requires the commissioners to employ vague, subjective criteria—uprightness and intelligence—which themselves invite a broad discretion that may be exercised in

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[24] Among the evidence proffered by petitioner but excluded by the trial court (PR. 5, 8, 12, 70, 93, 95) were jury boxes clearly indicating the race of prospective jurors. The traverse or petit jury box for August 9, 1954, showed seven persons following 321 names, who were given special numbers, i.e., "1C" through "7C" (PR. 279) and the traverse jury box for August 1, 1960, showed six persons, following 331 names, who were listed as "colored" (PR. 288).

a discriminatory manner. Cf. *United States* v. *Louisiana*, 225 F. Supp. 353, 396-97, *aff'd*, 380 U. S. 145; *United States* v. *Atkins*, 323 F. 2d 733 (5th Cir. 1963), and cases there cited; *Rabinowitz* v. *United States*, 366 F. 2d 34, 58 (5th Cir. 1966).

In *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156 (E. D. Va. 1964), *aff'd sub nom. Tancil* v. *Woolls*, 379 U. S. 19, a three-judge district court declared that Virginia statutes requiring that lists of voters and taxpayers be kept in separate books according to race violated the Fourteenth Amendment. The district court stated that it was now

> axiomatic that no State can directly dictate or casually promote a distinction in the treatment of persons solely on basis of their color. To be within the condemnation, the governmental action need not effectuate segregation of facilities directly. Cf. *Anderson* v. *Martin*, 375 U.S. 399, 402, 84 S.Ct. 454, 11 L.Ed. 430 (1964). The result of the statute or policy must not tend to separate individuals by reason of difference in race or color. No form of State discrimination, no matter how subtle, is permissible under the guarantees of the Fourteenth Amendment Freedom. 230 F. Supp. at 157-158.

And when used as the basis for jury selection, the discriminatory effect of segregated tax lists is far from "subtle." The vice of using such lists is two-fold under Charlton County practice. First, the jury commissioner has the means of willful racial discrimination ready to hand. Second, even if a commissioner wishes not to dis-

criminate, he is nonetheless required to make a judgment as to the proportions in which white and Negro taxpayers shall be chosen for jury service. For it is only after considering the white list that the white jury commissioner turns to the Negro list; thus, he obviously must make the conscious decision at some point that there are enough whites and that Negroes shall now be selected. It will not do to say that this result is the inevitable product of a selection process that starts with tax lists that the State, for other legitimate reasons, may require to be kept in segregated form. For the precise holding of *Hamm* is that the State has no interests which justify the segregated lists and that they are unconstitutional in themselves. By refusing to give full weight to the *Hamm* decision and to this Court's affirmance of it, the Georgia Supreme Court, in a capital case, has permitted one unconstitutional practice to spawn a more vicious one. In so doing, we submit, it has decided this case in a fashion that conflicts with *Whitus*, and with several earlier applicable decisions of this Court, thereby making review by certiorari appropriate under Rule 19(1)(a), Cl. 2.

The Georgia Supreme Court tried to minimize the significance of the racially segregated tax lists on the ground that the jury commissioners acted without regard to race (PR. 330). But such protestations of good faith are not in these circumstances sufficient. *Norris* v. *Alabama*, 294 U. S. 587. A selection procedure which provides unnecessary opportunities for discrimination violates the Fourteenth Amendment, whether or not those opportunities are proved to have been seized. In *Avery* v. *Georgia*, 345 U. S. 559, a conviction was reversed because the names of potential jurymen were

placed on different colored slips according to race. The trial judge testified that he selected the slips without regard to color, but Chief Justice Vinson stated that "Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process." *Id.* at 562. And Justice Frankfurter, concurring said: "We may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips were used." *Id.* at 564. Both in *Avery* and here the use of a procedure relying upon racial differentiation of prospective jurors denies equal protection. As this Court concluded in *Williams* v. *Georgia*, 349 U. S. 375, 382, "it was the system of selection and the resulting danger of abuse which was struck down in *Avery* and not an actual showing of discrimination on the basis of comparative numbers of Negroes and whites on the jury lists." That conclusion is no less applicable here. Cf. *Anderson* v. *Martin*, 375 U. S. 399.

We believe that *Whitus* v. *Georgia*, 385 U. S. 545, 551, relying upon both *Avery* and *Williams*, declared a *per se* rule invalidating jury selection procedures that include resort to statutorily segregated tax records. We urge the Court therefore to grant review here, in order to clarify and confirm that meaning of *Whitus*. If, however, *Whitus* is a decision of somewhat narrower scope, its result depending in material part upon the actual showing there made of racial disproportions in the composition of jury lists, certiorari should nonetheless be granted in this case. For the factual showing here is so like that in *Whitus* that to let

Sims' conviction stand is to condone and invite lower court distinctions of *Whitus* that reduce it to a trifling and insignificant holding and render it a derelict.

The constitutional infirmities inherent in Charlton County's juror selection procedures are amply, indeed dramatically, demonstrated by a review of the statistical results of the system's operation. Employing the technique to determine mathematical probability noticed by Mr. Justice Clark writing for the Court in *Whitus*, 385 U. S. at 552, n. 2, and applying the formula given in the Appendix, *infra*, p. 8a, to the facts of this case, the probability is approximately 0.00002, or one in 50,000, that non-racial jury selection would yield no more than 5 Negroes on a jury list of 99 when Negroes constituted 20% of the tax list from which jurors' names were selected.[25] See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338 (1966). The probability of this occurrence is so minute that statisticians would uniformly reject the hypothesis that selection was made without regard to race. See, *e.g.*, Hoel, INTRODUCTION

[25] The 1960 United States Census for Charlton County shows 2,656 persons over twenty-one, of whom 728 or 27.4% are non-white (PR. 75). The tax digest books show 1,838 Charlton County taxpayers in 1961, of whom 367 or 19.9% are Negroes (PR. 74), and 1,908 taxpayers in 1962, of whom 420 or 22% are Negroes (PR. 74). There were 1,959 Charlton County taxpayers in 1963, of whom 410 or 20.4% were Negroes (PR. 74). Of the 99 jurors chosen by the judge for the October 1964 Term of the Charlton County Superior Court, from which the grand and petit jurors were selected in petitioner's case, only 5 or about 5% were identified as Negroes (PR. 74, 89-90, 297-98). No statistics regarding the number of taxpayers in 1964 were introduced at trial nor were the names and racial identification of taxpayers in the 1964 jury boxes proffered at trial.

TO MATHEMATICAL STATISTICS 49 (1962).[36] As in *Whitus*, the state did not introduce evidence to rebut petitioner's prima facie case. Thus we submit there is no ground on which the thrust of *Whitus* can be avoided here. Nor can the *Whitus* holding be made effective if decisions such as that of the Georgia courts in this case are left unreviewed.[37]

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[36] The only jury commissioner who testified stated that jurors were selected on the basis of being "intelligent, upright and good citizens" (PR. 78). In order to sustain the state's contention that these factors rather than race accounted for the disparity between the number of Negroes on the tax list and those selected for the jury lists, it would be necessary to assume that on the average three to four times as many whites met these subjective qualifications than did Negroes. See *Finkelstein, supra*, where the method of analyzing the subjective qualifications issue is discussed. No evidence of any such superior rate of qualifications on the part of white taxpayers was introduced by the State nor is there any evidence that this small number of Negroes appearing on the jury list was the result of the application of the statutory criteria.

[37] For the information of the Court, petitioner submitted the affidavit of one of his counsel at the March 31, 1967, hearing in the Superior Court in support of a motion urging the controlling effect of *Whitus* (IR. 256-257). The Superior Court overruled the motion (IR. 260), did not admit the affidavit in evidence (IR. 268), but permitted the affidavit to be made a part of the record where it is reproduced at IR. 212-226. The affidavit concerns the number and race of individual taxpayers on the 1964 tax digest and jury lists. The affidavit's essential information is here set out to aid the Court and to correct the apparently inaccurate data in the Brief for Respondent at 29, n. 2, *Sims* v. *Georgia*, 385 U. S. 545.

The 1964 tax digest listed 1,553 individual taxpayers, of whom 380 or 24.4% were Negro individual taxpayers (Harper Affidavit, IR. 213). Of the 147 names on the September 3, 1964, grand jury list, from which petitioner's grand jury was selected, approximately 7 or 4.7% were Negroes (Harper Affidavit, IR. 213). Of the 479 names on the September 3, 1964 traverse jury list, from which petitioner's traverse jury was selected, approximately 47 or 9.8% were Negroes (Harper Affidavit, IR. 212-213). Of the panel of 99 jurors chosen for the October, 1964 Term of the Charlton Superior Court, from which the grand and traverse jurors were selected in Sims' case, approximately 9 or 9% were Negroes (Harper Affidavit, IR. 213-214).

A comparison of the September 3, 1964 grand and traverse jury lists with the Colored Tax Payer section of the 1964 tax digest

B. *The Georgia Courts Unconstitutionally Refused to Receive Petitioner's Proffered Proof of Racial Discrimination in the Selection of Jurors.*

Prior to his trial, petitioner offered to prove by certified jury boxes and lists covering the period 1954-1963 a pattern of arbitrary exclusion or limitation of Negroes on the jury lists of Charlton County. "Jury lists for a ten year period were offered in evidence. All were excluded except for the lists of jurors from which the juries who indicted and convicted were taken." Opinion of Georgia Supreme Court (PR. 331). Petitioner also offered these lists to prove that the presence of a Negro on the grand jury which reindicted petitioner following the reversal of his conviction in *Sims* v. *Balkcom*, 220 Ga. 7, 136 S. E. 2d 766 (1964), was the result of arbitrary inclusion on the 1964 jury list. These offers of proof were ruled inadmissible apparently on the ground that the grand and petit jury lists in the County had been revised during the summer of 1964, immediately prior to petitioner's reindictment and trial (PR. 5, 8, 12, 70, 93, 95). The ruling was affirmed by the Georgia Supreme Court on the ground that no showing had been made of discrimination in the composition of the grand and petit juries involved in the instant case (PR. 331).

It is a principle needing no elaboration that in a jury discrimination case, ". . . this Court must reverse on the ground that the defendant 'offered to introduce witnesses to prove the allegations . . . and the [state trial] court declined to hear any evidence on the subject. . . .'" *Coleman* v. *Alabama*, 377 U. S. 129, 133, quoting with approval, in a

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revealed that the names of Negroes where they appeared on those lists, were virtually without exception consecutively listed out of alphabetical order (Harper Affidavit, IR. 214).

unanimous opinion, from *Carter* v. *Texas*, 177 U. S. 442, 448-49. With the notable exceptions of *Coleman* and *Carter*, this Court has consistently reviewed jury discrimination cases on a record covering a number of years. E.g., *Neal* v. *Delaware*, 103 U. S. 370, 397 (no Negro had ever served as juror); *Norris* v. *Alabama*, 294 U. S. 587, 591 (no Negro had served within witnesses' memory); *Pierre* v. *Louisiana*, 306 U. S. 354, 361 (*ibid.*); *Smith* v. *Texas*, 311 U. S. 128, 129 (7 years); *Eubanks* v. *Louisiana*, 356 U. S. 584, 586 (18 years); *Hernandez* v. *Texas*, 347 U. S. 475, 482 (25 years); *Reece* v. *Georgia*, 350 U. S. 85, 87 (18 years); *Arnold* v. *North Carolina*, 376 U. S. 773, 774 (24 years); and see *Brooks* v. *Beto*, 366 F. 2d 1, 9 (5th Cir. 1966) (no Negro had ever served as grand juror); *Scott* v. *Walker*, 358 F. 2d 561, 572 (5th Cir. 1966) (6 years); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 63, n. 5 (5th Cir. 1962) (11 years); *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 78 (5th Cir. 1959) (no Negro had served within witnesses' memory).

Notwithstanding this substantial body of precedent, establishing beyond peradventure the pertinency of a pattern or practice of past discrimination as a basis for interpreting the significance of the composition of particular juries in the case at issue, the state trial court refused to permit petitioner to examine a jury commissioner regarding the number of Negroes in a petit jury box compiled just *two years* prior to trial.

> The Solicitor General: Your Honor, we will make our objection . . . as to going into a [1962] jury list that doesn't have anything to do with the present grand jury or petit jury. . . . We say under the law he [petitioner] is entitled to a cross section of petit

jurors and grand jurors, but that could only pertain to this petit jury and this grand jury—not some that used to be.

The Court: I am of the opinion that would be right (PR. 88-89).

Petitioner was thus thwarted in his attempt to make a full record upon which a continuing pattern or practice of racial discrimination in jury selection in Charlton County might have been based. His contention of *systematic* exclusion or limitation of prospective Negro jurors in selection of his grand and petit juries was thus deprived of the evidentiary support which derives from placing present practices in the meaningful context of past actions. As this Court has recognized, "Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known." *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 69. Petitioner seeks nothing more than to have his day in court on his federal constitutional claims. This he has been denied, and with it the equal protection of the laws. Certiorari should be granted to establish the point—not yet declared by this Court, but, we submit, obvious and obviously ignored below—that one refilling of a jury box does not make a ten-year history of racial exclusion irrelevant to the federal contention of systematic discrimination in juror selection.

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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24152.

1. Questions adjudicated upon the first appearance of a case before this court become the law of the case and cannot be readjudicated by subsequent appearances here.

2. The judgment of the trial court finding the defendant's confession to have been voluntarily made was not error for any reason assigned.

Argued June 12, 1967—Decided June 23, 1967—Rehearing denied July 6, 1967.

Rape. Charlton Superior Court. Before Judge Hodges.

The defendant has twice been convicted of rape by force in the Superior Court of Charlton County. The first conviction was reversed by this court. Stone v. Balkcom, 219 Ga. 5 (136 SE2d 769). After the second trial an appeal was taken to this court where such second conviction was affirmed (Stone v. State, 221 Ga. 190 (144 SE2d 103)), however, on certiorari the U. S. Supreme Court reversed the judgment of this court on one ground only (Stone v. Georgia, 385 U. S. 538 (87 SC 639, 17 LE2d 585)). Thereafter, the judgment of the U. S. Supreme Court was made the judgment of this court and the case was remanded to the Superior Court of Charlton County for a hearing before the court as to the voluntariness of the defendant's confession. See Stone v. State, 223 Ga. 126 (153 SE2d 687). On the hearing the trial court found the confession had been voluntarily made and the conviction was affirmed. This appeal is from that judgment.

Harrison Stone, pro se.

Eli Cannon, Attorney General, Arthur K. Bolton, Assistant Attorney General, Marion O. Gordon, Assistant Attorney General, Jack Hancock, Assistant Attorney General, for appellee.

CONCLUSION

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24152. SIMS v. THE STATE.

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Howard Moore, Jr., Jack Greenberg, James M. Nabrit, III, Conrad K. Harper, for appellant.

Dewey Hayes, Solicitor General, Arthur K. Bolton, Attorney General, Marion O. Gordon, Assistant Attorney General, Mathew Robins, Deputy Assistant Attorney General, for appellee.

Nichols, Justice. After the remittitur from this court was made the judgment of the trial court the defendant sought again to present questions for decision by the trial court which had been previously adjudicated and affirmed by this court on the appearance of the case reported in 221 Ga. 190. The judgments of the trial court there affirmed are established as the law of the case and the enumeration of error seeking to re-adjudicate such questions presents nothing for decision by this court. See Rawlins v. State, 126 Ga. 96 (54 SE 924), and Reece v. State, 211 Ga. 339 (85 SE2d 773), reversed on other grounds 350 U. S. 85 (76 SC 167, 100 LE 77).

2. The U. S. Supreme Court in reversing the prior decision of this court held that a separate hearing should be had on the question of the voluntariness of the defendant's confession. This hearing was held after the remittitur from this court was made the judgment of the trial court and by agreement the question was considered by the trial court based upon the record previously made in the case.

The trial took place prior to June 14, 1966, and the strict requirements of Miranda v. Arizona, 384 U. S. 436 (86 SC 1602, 16 LE2d 694, 10 ALR3d 974), do not apply. See Johnson v. New Jersey, 384 U. S. 719 (86 SC 1772, 16 LE2d 882); Gunter v. State, 223 Ga. 290, 294 (154 SE2d 608).

The defendant testified that after being arrested he was taken to the office of Dr. Jackson where several people were present. The defendant was then asked by his attorney: "Q. And did anything happen to you after you got in Dr. Jackson's office? [fol. 169] A. Yes, sir. Q. What happened to you Isaac? A. Well, Dr. Jackson, he knocked me down and kicked me over my eyelid and busted my eye on the right side. Q. Did anything else happen to you? A. And he grabbed me by my private and drug me on the floor. Q. Did he drag you by your private on the floor? A. Yes sir. Q. Did that hurt you, Isaac? A. Yes, sir. Q. Did it hurt you a lot? A. Yes, sir; pretty bad."

On cross examination the defendant testified that deputy sheriff Dudley was present when he made a statement, that he remembered the deputy sheriff telling him that anything he said could be used against him in court, that he had known the deputy sheriff for twelve or thirteen years, was not afraid of him and if he (the deputy sheriff) had read anything in the statement which the deputy sheriff took down as he (the defendant) made his statement which was wrong he would not have been afraid to tell him that it was wrong. He testified that he did not remember if he was advised of his right to counsel.

The physician, Dr. Jackson, who the defendant accused of knocking him down, pulling him around by his private and kicking him, testified on the trial of the case that he did not knock the defendant down and did not kick him. He further testified that the defendant was in his office for only fifteen or twenty minutes and that the only thing he did was help remove the defendant's pants and shorts so that they could be "checked" as a result of the charges made against him. The officers testifying in the case testi-

fied as to the circumstances surrounding the defendant making the confession. These circumstances are fully set forth in Sims v. State, 221 Ga. 190, 197, supra, as follows: "The undisputed evidence as to the time and manner in which the statement was taken is as follows: The offense was committed about 10 a. m. on April 13, 1963. About 3 p. m. of the same day the defendant was arrested by Sergeant Sims of the State Patrol. Under instructions of Sergeant Sikes of Charlton County he was taken to the office of Dr. Jackson, and then to the jail in Waycross where he was placed in the custody of Ware County Sheriff Lee. About 6:30 p. m. of the same day, one Dudley Jones, a Deputy Sheriff of Ware County, saw the defendant whom Jones had known for twelve years or more. No one else was present—Jones asked him what 'he was doing up there.' Sims replied that he 'got in trouble with a white woman in Folkston, Georgia'; 'that he raped a white woman in Folkston.' Jones asked him whether he wanted to make a statement to that effect to the sheriff. Sims replied that he did. Jones took him to the sheriff's office where his statement was taken, reduced to writing, and signed at about 10:30 p. m. on April 13, 1963. Sheriff Lee testified that before the defendant made any statement he advised him that he was entitled to an attorney and that the defendant said he did not want an attorney; he advised Sims that any statement he made could be used against him. The sheriff further testified that no threats or promises of hope of benefit or reward were made to induce Sims to make a statement. His statement was reduced to writing and signed by Sims in the presence of the sheriff, the Chief of the Ware County Police, Jones, the deputy sheriff of the county, and B. C. Worley, a constable. On April 15, 1963, after Sims had been transferred to the Charlton

County jail at Folkston, F. F. Cornelious of the Bureau of Investigation read to the defendant his written statement of April 13 and he asked Sims if it was true. Sims replied, 'Yes sir, that is right.'"

The trial judge, as the trier of fact, who presided at the trial when the various witnesses testified, had the opportunity of judging their credibility and it cannot be said the decision of the trial court finding that the confession was voluntarily made was error for any reason assigned.

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

Atlanta, June 22, 1967

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Isaac Sims, Jr., v. The State.

This case came before this court upon an appeal from the Superior Court of Charlton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

Atlanta, July 6, 1967

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Isaac Sims, Jr., v. The State.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

APPENDIX ON COMPUTATION

The probability that no more than five Negroes would be selected out of 99 when Negroes constituted 20% of the tax list from which the selections were made may be computed by using a formula known as the cumulative binomial distribution. The value of this formula can be determined either by using ready-made tables or approximation methods. We have used the table appearing in Harvard Computation Laboratory, *Tables of the Cumulative Binomial Probability Distribution* (1955). Using that table we have the following for the probability P that no more than five Negroes would be selected:

$$P(v \leq 5) = \sum_{v=0}^{v=5} \frac{n!}{v!(n-v)!} p^v q^{n-v}$$

$$= \sum_{v=0}^{v=5} \frac{99!}{v!(99-v)!} (0.20)^v (0.80)^{99-v}$$

$$= 0.00002+$$

A description of the derivation and terms of the formula and the use of the tables appears in Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966).